IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

CHAMBER SUMMONS NO.1227 OF 2005
IN
EXECUTION APPLICATION (LODG) NO.377 OF 2005
IN
SUIT NO.2559 OF 2000

Lok Housing and Constructions Limited
and Ors. ..Plaintiffs

V/s.

HDFC Bank Ltd., ..Defendants

Mr.Jai Chinai with Lalit Jain i/by M/s.Pravin Mehta & Co. for plaintiffs.

Mr.Chirag Balsara i/by M/s.K.Ashar & Co. for Defendants.

Coram : A.M.Khanwilkar,J

Date : 24.10.2005.

PC

1. This Chamber summons is filed for the following reliefs :-

"(a) that in pursuance of the Agreement arrived at between the Plaintiffs and the Defendant and as recorded in letters dated 14th April 2005, 21st April 2005 and 26th April 2005 being Exhibits "G" and "I" to the Affidavit of Shri Subhash S.Shirodkar, in support of this Chamber Summons, the Decree dated 1st June, 2004 passed in the above Suit is adjusted and/or modified and/or veried and upon payment of Rs.75,41,463/- (Rupees Seventy five lakhs forty one thousand four hundred sixty three only) or such other amount as may be directed by this Hon'ble Court, by the Plaintiffs to the Defendant, the Decree dated 1st June 2004 passed in the above Suit is marked fully satisfied ;

(b) that upon payment in terms of prayer (a) by the

Plaintiffs, this Hon'ble Court be pleased to order that the Defendant does not have any charge over the properties mentioned in the said Consent Decree dated 1st June, 2004 and that this Hon'ble Court may be pleased to pass such further and other directions as may be necessary for the release of the said charge over the said properties ;

(c) that this Hon'ble Court may be pleased to direct the Defendant to withdraw the Complaints viz.(i) Complaint No.298/S/2002 filed before the Metropolitan Magistrate's 23rd Court, (ii) Complaint No.6650/S/2002 filed before the Metropolitan Magistrate's 10th Court, (iii) Complaint No.6651/S/2002 filed before the Metropolitan Magistrate's 10th Court and (iv) Complaint No.295/S/2002 on the files of the Metropolitan Magistrate's 23rd Court and return to the Plaintiffs Cheques bearing No.(i)846362, (ii) 846363, (iii) 846364, (iv) 846365 (v) 846366 (vi) 846367,(vii) 846368, (viii) 846369, (ix) 846370, (x) 846371 within such time and on such terms and conditions as this Hon'ble Court may deem fit and proper;

(d) that pending the hearing and final disposal of the above Chamber Summons, this Hon'ble Court be pleased to stay the operation of the said Decree dated 1st June, 2004 passed in the above suit ;

(e) That pending the hearing and final disposal of the above Chamber Summons, this Hon'ble Court be pleased to permit the Plaintiffs to deal with and dispose of the properties and securities mentioned in the said Consent Decree dated 1st June, 2004 on such terms and conditions as this Hon'ble Court may deem fit;

(f) that pending the hearing and final disposal of the above Chamber Summons, this Hon'ble Court may be pleased to stay the proceedings pending before the Metropolitan Magistrate's Courts as mentioned in prayer (c) above ;

(g) for ad-interim reliefs in terms of prayers (d) to (f) above ;

(h) for costs ;

(i) for such other and further reliefs as the nature and circumstances of the case may require."

. During the course of arguments, however, Counsel for the applicants fairly submitted that relief in

terms of prayer clause-(c) is not pressed. Accordingly the main relief to be considered is whether the subject decree can be marked as fully satisfied in the fact situation of the present case.

2. The background in which this Chamber summons is filed is that plaintiff nos.1 to 4 had originally filed a suit for declaration that the sale of pledged shares by Times Bank Limited (hereinafter referred to as the original defendant) is illegal and contrary to the provisions of law. The said suit was filed in the City Civil Court at Bombay which was numbered as Suit No.2137/1999. The said plaint was however, returned by the City Civil Court for presentation to proper Court. Accordingly, plaintiffs presented the plaint in this Court which suit was numbered as Suit No.2559/2000. The original defendant was amalgamated with the defendant on 17.2.2000. Be that as it may, the suit pending before this Court was decreed in terms of the Consent terms dated 1.6.2004. By the said Consent terms, plaintiffs agreed to pay an amount of Rs.2.25 crores together with simple interest thereon @ 9% p.a. in instalments as set out in clause-4.1 of the Consent terms. The consequences for default in making the payment are also provided in the said Consent terms. It is the plaintiffs' case that pursuant to the said decree plaintiffs paid amount of Rs.1,29,26,000/- to the defendant. In other

words, the balance payment due to the defendant was in the sum of Rs.1,07,00,000/-. Plaintiff no.1 by letter dated 14.4.2005 suggested a fresh mode of payment of the balance amount of Rs.1,07,00,000/-. The plaintiffs also suggested certain arrangement in respect of four flats to be given in security to the defendant. This letter is marked as Exh.G to the affidavit and is referred to in the prayer clause. It is the case of the plaintiffs that further discussion took place between the parties when the defendant informed that the sale agreement in respect of flats agreed to be given as security should be sold. However, the plaintiffs were of the view that if the flats were to be given as security, the same were not required to be sold. The plaintiffs suggested that they could deposit sum of Rs.10 lakhs with the defendant which could be utilised for payment of stamp duty in the event the flats are required to be sold by the defendant or the amount of Rs.10 lakhs could be adjusted in payment of last instalment of Rs.32 lakhs. The discussion which took place between the parties during the meeting, according to the plaintiffs, was recorded in the letter dated 21.4.2005, which letter is marked as (Exh.H) to the affidavit and referred to in the prayer clause. It is stated that the defendant by letter dated 26.4.2005 informed that the proposal contained in letters dated 14.4.2005 and 21.4.2005 was acceptable to the defendant in

principle. The defendant also informed that the defendant has advised its Counsel to approve the consent terms wherein the terms and conditions already arrived at would be articulated. According to the plaintiffs, this communication sent by the defendant constituted agreement between the plaintiffs and defendant amounting to adjustment of the consent terms and the decree passed in terms thereof which was valid, subsisting and binding agreement and acted upon by the plaintiffs. Letter received from the defendant is annexed as Exh.I to the affidavit in support which is referred to in the prayer clause.

3. According to the plaintiffs, in order to put the said adjustment in a formal document, the defendant alongwith its letter dated 4.5.2005 forwarded a copy of the draft consent terms to be executed for being placed on record of this Court. It is stated that the defendant also forwarded E-mail on or before 13.5.2005 containing a draft consent terms. Plaintiffs by written E-mail dated 13.5.2005 suggested modification in the said draft consent terms. It is stated that the defendant also forwarded the said draft to its Advocate by E-mail dated 13.5.2005. Later the defendant by its E-mail dated 16.5.2005 forwarded revised draft of the consent terms to the plaintiffs. The plaintiffs state that they did not object to and accepted the

suggestion made by the defendant. It is then stated that the adjustment was formalised and was final and binding upon the parties. It is then stated that plaintiff no.1 by letter dated 31.5.2005 forwarded a cheque in the sum of Rs.35 lakhs to the defendant being amount of first instalment of Rs.25 lakhs plus Rs.10 lakhs to be kept by the defendant as security deposit for stamp duty to be adjusted towards the last instalment. It is the case of the plaintiffs that the defendant was instructed that the plaintiff no.1 will inform the defendant once the funds for cheque have been arranged and requested the defendant to cooperate till then. It is the case of the plaintiffs that the cheque of Rs.35 lakhs was to be deposited by the defendant only upon filing of the consent terms in the Court. It is the case of the plaintiffs that the defendant however, without obtaining requisite confirmation of the plaintiffs deposited the said cheque of Rs.35 lakhs, which was returned unpaid on or about 18.6.2005. The plaintiffs on learning this position immediately by letter dated 20.6.2005 pointed out to the defendant that the amount of Rs.35 lakhs was to be paid on filing of the consent terms. Besides, the plaintiffs informed the defendant that though as per the agreed adjustment the amount of Rs.1,07,00,000 was to be paid over within the period of 105 days from filing of the consent terms, the plaintiffs were open to preponing the payment schedule and the

entire amount could be paid before the period contemplated by the adjustment. However, the defendant by its letter dated 7.7.2005 wrote to the plaintiffs that as the cheque of Rs.35 lakhs has been dis-honoured, no revised consent terms will be filed by the defendant. The defendant asserted that the cheque was deposited as per the discussion with Mr.Unikrishnan an officer of plaintiff no.1. The defendant further called upon the plaintiffs to pay sum of Rs.7,67,85,659/- as the defendant was entitled to recover that amount in view of the default clause in the original consent terms. The plaintiffs by letter dated 8.7.2005 however, denied their liability to pay the amount as demanded by the defendant. The plaintiffs also denied that consent was given by Mr.Unikrishnan of plaintiff no.1. Besides, the plaintiffs placed on record that they will be in a position to pay the entire amount on or before 31.7.2005. On 29.7.2005 the plaintiffs informed the defendant that in view of the recent disaster in Bombay due to heavy rains, the plaintiffs were not in a position to arrange for payment of entire amount on or before 31.7.2005 and requested for some more time. It is stated that the defendant again deposited the cheque in the sum of Rs.35 lakhs which was honoured by the banker for the plaintiffs in or around 1.8.2005. According to the plaintiffs therefore, the defendant has accepted and acted upon the suit adjustment and has also condoned

the default committed by the plaintiffs if any. On 5.8.2005 the plaintiffs pointed out to the defendant that they would pay the balance amount of Rs.72 lakhs (Rs.1,07,00,000 minus Rs.35,00,000) alongwith interest within one week. It is stated that on 17.8.2005 plaintiffs under the cover of its letter forwarded copy of the pay order in the sum of Rs.75,41,463 (being Rs.72 lakhs alongwith interest). The plaintiffs also requested the defendant to inform the plaintiffs whether the defendant will accept the same as per the adjustment so that the same can be delivered to the defendant. However, defendant did not reply to the said communication sent by the plaintiffs. Later on in the meeting held, it is stated by the plaintiffs that, the officer of the defendant informed that they will not act upon adjustment because the value of the securities given by the plaintiffs had increased. The plaintiffs thereafter recorded the conduct of the defendant in its letter dated 21.8.2005. As no response was received, plaintiffs filed the present Chamber summons on 20.9.2005.

4. The defendant has filed reply affidavit denying the claim of the plaintiffs. In substance the stand taken by the defendant is that no revised consent terms have been accepted by the defendant. In any case, the plaintiffs have not complied with the said revised consent terms. It is the case of the

defendant that the communication exchanged between the parties was without prejudice to the proceedings before this Court and cannot be used against the defendant. According to the defendant the agreement is not a concluded agreement. Besides, the same has not been acted upon. In any case the conditions of the revised consent terms have not been fulfilled resulting in revival of the original terms contained in the consent terms dated 1.6.2004 enabling the defendant to proceed against the plaintiffs for recovery of the entire amount alongwith specified interest. Besides filing reply on merits the defendant raised preliminery objection regarding the maintainability of the present Chamber summons. In so far as the question regarding maintainability of the present Chamber summons is concerned, the same was considered by me and negatived by order dated 2.10.2005. It is not necessary to burden this order with the said aspect. Suffice it to observe that the matter was fully heard on 3.10.2005 even on merits, after opinion on the preliminery objection was recorded by me. I deferred the passing of order on the Chamber summons in relation to merits of the case as parties requested for some time to explore the possibility of settlement. As I was later on informed that settlement was not possible, the matter has been placed for orders today.

5. After going through the pleadings and the

documents on record and the rival submissions canvassed across the bar, the first question arises for consideration is : whether the parties arrived at revised consent terms as is contended by the plaintiffs. I have no difficulty in accepting the stand of the plaintiffs on this issue. From the materials on record it is clear that after the consent decree was passed on 1.6.2004 the plaintiffs paid only part of the amount till April-2005. The plaintiffs by then had paid only sum of Rs.1,29,26,000/- as against the liability to pay Rs.2.22 crores in instalment provided for in clause 4.1 of the consent decree. The consent decree dated 1.6.2004 also provides for consequences for default. Suffice it to observe that as payment was outstanding the plaintiffs by letter dated 14.4.2005 gave a proposal regarding modified terms regarding payment of balance amount of Rs.1,07,00,000/-. This letter was followed by letter dated 21.4.2005 sent by the plaintiffs suggesting arrangement to be arrived at with regard to payment of Rs.10 lakhs towards stamping of the agreement. Pursuant to the said offer made by the plaintiffs which was duly considered by the defendant and decision was taken by the defendant which is mentioned in its communication dated 26.4.2005 addressed to the plaintiffs. The defendant in the said communication has stated that the proposal contained in the letter sent on behalf of the plaintiffs was agreeable in

principle to the bank. Thereafter the bank forwarded the revised consent terms under the cover of its letter dated 4.5.2005. The plaintiffs have accepted the substance of the revised consent terms suggested by the defendant, except suggesting minor changes with regard to the modalities regarding the securities held by the defendant. From the correspondence on record, I have no hesitation to take a view that revised consent terms were arrived at between the parties.

6. The next question posed on behalf of the defendant is whether the revised consent terms can be said to be concluded agreement. I have no difficulty in accepting the argument of the plaintiffs that the revised consent terms as forwarded by the defendant and accepted by the plaintiffs constituted concluded agreement between the parties. By this revised consent terms the clauses with regard to instalment in the original consent decree was to be modified and adjusted. From the documents on record it is also abundantly clear that in fact the defendant acted upon the revised consent terms. The plaintiffs had issued cheque in favour of the defendant in the sum of Rs.35 lakhs under the cover of its letter dated 31.5.2005. In the said letter it is stated that the plaintiffs will be in a position to file consent terms within 8-10 days; and that the plaintiffs

were forwarding cheque in the sum of Rs.35 lakhs. The letter also records that the plaintiffs will inform the defendant for depositing the cheque towards the funds have been arranged for making the payment. The cheque so issued was in furtherance of the obligation of the plaintiffs under the revised terms to pay the first instalment in the sum of Rs.25 lakhs and further sum of Rs.10 lakhs alongwith first instalment which was to be kept as deposit by the defendant against stamp duty. The cheque so issued by the plaintiffs was deposited by the defendant. It is not necessary for me to go into the controversy whether the said deposit was proper or otherwise. Suffice it to observe that, in fact, the defendant acted upon the consent terms. The cheque which was deposited without consent on 18.6.2005 was however, returned by the bankers. The defendant again deposited the same cheque on 1.8.2005, which is indicative of the fact that the defendant acted upon the revised consent terms arrived at between the parties.

7. The next question arises for consideration is : whether the plaintiffs fulfilled the obligations arising under the revised consent terms. It is seen from the revised consent terms that the plaintiffs were required to pay first instalment in the sum of Rs.25 lakhs within 15 days from 7.5.2005 whichever is later. The 2nd instalment was to be paid within

30 days from the above said condition and the 3rd instalment within 30 days and the last instalment of amount within 90 days. In other words, the outer limit to pay first instalment was 7.5.2005. Till then no amount was paid or offered to the defendant. Whereas, Plaintiffs issued cheque in favour of the defendant in the sum of Rs.35 lakhs only on 31.5.2005 which was deposited by the defendant on 18.6.2005 which according to the plaintiffs was deposited without their instructions. The said cheque was however, returned back by the bankers. The same was redeposited by the defendant once again on 1.8.2005 and was encashed. In view of the chronology of events it is possible to take a view that the defendant waived the requirement of paying the first instalment within the specified time. In other words, the defendant waived the delayed payment towards first installment under the revised terms offered by the plaintiffs.

8. Going by the terms, in particular clause-F of the revised consent terms, I find substance in the argument of the defendant that the plaintiffs have failed to fulfill the obligation under the said consent terms. Failure by the plaintiffs is ascribed on two basis. The first is of non payment of the instalment within the specified time. The second is on account of non furnishing of securities. In so far as later is concerned, I

agree with the submission of the plaintiffs that the question of offering security would not arise as the plaintiffs were offering bullet payment to the defendant. In as much as, the plaintiffs were offering pay order in the sum of Rs.75,41,463/- to cover the outstanding amount of Rs.72 lakhs alongwith interest. However, that offer has been rejected by the defendant as the payment was offered on 17.8.2005, which was not in conformity with the revised consent terms. The time specified under the revised consent terms was that the first instalment was to be paid on or before 7.5.2005, the 2nd instalment before 7.6.2005, 3rd instalment before 7.7.2005 and the last instalment by 7.8.2005. Out of this only one instalment was offered by the plaintiffs being Rs.25 lakhs, which was also beyond time. As mentioned earlier, we will assume that the defendant condoned the delay in offering the first instalment of Rs.25 lakhs before 7.5.2005, in view of its conduct of encashing the cheque offered by the plaintiffs in that behalf. Nevertheless, there is nothing on record to suggest that the plaintiffs offered the 2nd, 3rd or 4th instalment respectively before the specified period. The plaintiffs on the other hand offered to settle the entire claim amount before 31.7.2005. Even that commitment was not fulfilled. The defendant has not commented upon either way with regard to the offer given by the plaintiffs under its letter dated 17.8.2005 and the

offer of sum of Rs.75,41,463/-. It necessarily follows that the defendant has not accepted the said offer given by the plaintiffs under its letter dated 17.8.2005. Suffice it to observe that the plaintiffs were unable to pay the amount towards respective instalments even till 29.7.2005, for want of funds, which position is accepted in its communication dated 29.7.2005 (Exh.Q). I have no difficulty in taking a view that the plaintiffs have not fulfilled the condition of the original consent terms in time. The plaintiffs have also failed to pay the entire amount as per the revised consent terms. It is only on payment of instalments with interest on the respective dates referred to in the original consent terms or the revised consent terms, it would be open to this Court to mark the decree fully satisfied and not otherwise.

9. Accordingly, the relief claimed in this Chamber summons to mark the decree dated 1.6.2005 as fully satisfied cannot be accepted. For this reason, the Chamber summons fails. The same is disposed of in the above terms. No order as to costs.

(A.M.Khanwilkar,J)